No. 77-237

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM NETTERVILLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 553 F. 2d 903.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1977. A petition for rehearing was denied on July 8, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on August 11, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court.

QUESTIONS PRESENTED

1. Whether the district court's instruction that "[t]he law presumes that every man intends the natural and probable consequences of his own knowing acts" was

reversible error in the context of the entire instruction and the circumstances of this case, when an *en banc* decision of the court of appeals has subsequently disapproved such charges for the future but specified that otherwise valid convictions already entered should not be reversed.

2. Whether petitioner was denied his right to a speedy trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. He was sentenced to three concurrent terms of five years' imprisonment.

The facts are set forth in the opinion of the court of appeals (Pet. App. 3a-6a, 15a-16a). The indictment charged that co-defendants Van Note, Watkins, and Chambers, and others, had established two corporations to sell automotive products through a network of consignment dealers. The dealers were recruited through advertisements placed in newspapers throughout the country. The advertisements described the two companies, which had been in existence for less than a year, as being 21 and 60 years old. Prospective dealers paid about $3,000 in advance for their dealerships and in return were assured shipment of inventory within three to six weeks, assignment of 15 or more retail locations, and a guaranteed "buy back" of unsold inventory. The companies salesmen represented to prospective dealers that the $3,000 payments would be used to purchase and ship inventory and sales materials and to establish retail locations. In fact, the money was used to pay the day-to-day operating expenses of the companies. The "buy back" agreement regarding unsold inventory was only partially

honored in some cases and not honored at all in others. Although a time came when some prospective dealers were advised after making their payments that the company had already filled its quota of dealers, in many of these cases the payments were not returned, and the two companies meanwhile continued to solicit additional dealers and to enter into agreements with them.

The companies' sales manuals contained a list of allegedly successful dealers whom prospective dealers could question by telephone. Among the names listed was "Don Mason." The telephone number given for Mason was petitioner's, and prospective dealers who called Mason reached petitioner, who played the part of a dealer and made false claims concerning the success of his "distributorship." One witness described these claims as "quite enthusiastic"; several witnesses testified that calls they made to such numbers provided by salesmen were influential in their decisions to apply for dealerships; and at least one prospect who purchased a dealership was introduced to the company by petitioner. At trial, petitioner claimed he was duped by his co-defendants into answering the telephone and telling the callers about the success of the "Don Mason" dealership, and that he had no way of knowing whether the information he was providing was true or false and thus lacked the requisite intent to defraud (Pet. App. 15a).

ARGUMENT

1. Petitioner contends (Pet. 3-8) that the district court committed reversible error by including in its instruction to the jury a passage stating that "[t]he law presumes that every man intends the natural and probable consequences

of his own knowing acts."[1] (Petitioner did not object to the use of the word "presumption," though he did object to the court's failure to state to the jury that the presumption could be rebutted. VI R. 1050-1051.)

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[1]The full instruction on intent given by the trial judge was as follows:

> You have been instructed that an essential element of the Mail Fraud offense charged is an intent to defraud and this intent must be established by the evidence beyond a reasonable doubt.
>
> To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self.
>
> Intent may be proved by circumstantial evidence. Indeed, it rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted; but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.
>
> The law presumes that every man intends the natural and probable consequences of his own knowing acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud can be presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. It is a well settled rule that the intent can be presumed and inferred from the result of the action. If a man knows that the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another, and he voluntarily and intentionally does that act, he may be chargeable in law with the intent to injure or defraud. These terms used in the law mean nothing more than that general intent to injure or defraud which may arise, in contemplation of law, when one willfully or intentionally does that which is illegal or fraudulent, and which, in its necessary and natural consequences, must injure another. Fraudulent intent is one of the essential elements of the offense of which the defendant is charged, and such intent must be clearly proved or inferred from the evidence beyond a reasonable doubt to warrant a conviction.
>
> In determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid in determination of the state of mind of the defendant.

The challenged instruction is of ancient vintage, having been approved by this Court in *Agnew* v. *United States*, 165 U.S. 36, and similarly worded charges have been sustained in recent years by the Court of Appeals for the Fifth Circuit. *E.g.*, *Estes* v. *United States*, 335 F. 2d 609, 616-617, certiorari denied, 379 U.S. 964; *United States* v. *Wilkinson*, 460 F. 2d 725, 729-730. But other panels of the Fifth Circuit, as petitioner points out, have held such charges to be reversible error. *E.g.*, *United States* v. *Chiantese*, 546 F. 2d 135; *Mann* v. *United States*, 319 F. 2d 404, certiorari denied, 375 U.S. 986. On October 14, 1977, after the petition for a writ of certiorari was filed in this case, the court of appeals, having granted a rehearing *en banc* in the *Chiantese* case, resolved the intra-circuit conflict by exercising its supervisory power to direct that "in all trials commenced 90 days after the date of this opinion[,] * * * [n]o district court in this circuit shall include in its charge to the jury an instruction on proof of intent which is couched in language which would reasonably be interpreted as shifting the burden to the accused to produce proof of innocence." *United States* v. *Chiantese*, 560 F. 2d 1244, 1255 (C.A. 5) (*en banc*). Three sentences identical to a portion of the charge given in this case[2] were quoted by the *en banc* court in *Chiantese* (560 F. 2d at 1255) as an example of the instructions that are not to be used in the future.

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[2]The quoted sentences read:

> The law *presumes* that every man intends the natural and probable consequences of his own knowing acts. Wrongful acts knowingly or intentionally committed can neither be justified or

The *en banc* court in *Chiantese* emphasized, however, that its ruling was "to be applied prospectively only" (560 F. 2d at 1256). The court stated (*ibid.*):

> We hold in the case at bar that the law of this circuit has been too uncertain to warrant the reversal of otherwise valid convictions based upon a trespass against language condemned here or in any prior opinions.

Even for the future, the court held that the giving of one of the disapproved instructions would not necessarily constitute reversible error:

> We refuse to classify the giving of a charge in violation of [the court's ruling], whether objected to or not, as the type of error which will automatically produce reversal. If, despite our action today, the error should recur, the weighing of its harm to the accused shall remain a judicial matter to be resolved in the context of each case where it occurs. Such weighing, however, shall not include consideration of whether a defective charge has been cured by prior or subsequent statements. [*Id.* at 1255.]

Since the *en banc* ruling in *Chiantese* is prospective only, it does not apply to this case. By assuring that instructions of the kind involved here will no longer be given by any district court in the Fifth Circuit, *Chiantese* does remove any need, such as petitioner asserts (Pet. 7-8), for this Court to grant certiorari here in order to

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excused on the ground of innocent intent. The intent to injure or defraud can be *presumed* when the unlawful act which results in loss or injury is proved to have been knowingly committed. [560 F. 2d at 1255 (emphasis by the court).]

resolve the conflict that had existed within the Fifth Circuit or to provide guidance for the court of appeals or for district courts in that circuit.

Nor is there, as petitioner claims (Pet. 5-7), a conflict between circuits. No circuit takes a position more favorable to defendants with respect to instructions of the kind involved here than the Fifth Circuit has now assumed in *Chiantese*. And no circuit has a rule that would have required reversal in this case. The cases cited by petitioner[3] all turned on consideration of challenged instructions as applied to the facts and circumstances of the particular case and in the context of related instructions.

The only remaining question is whether, in the circumstances of this case, the court's instruction to the jury on the issue of intent was so erroneous as to prejudice petitioner's rights and require this Court's intercession. We submit that it was not. As the court of appeals here found, "in the context of the entire charge the proper burden of proof was made unmistakably clear," and "the words complained of were not so misleading in the context of the entire charge as to require overturning the jury's verdict" (Pet. App. 28a-29a). Thus, shortly before the challenged language, the court instructed the jury that "an essential element" of the offense charged was "an intent to defraud and this intent must be established by the evidence beyond a reasonable doubt" (note 1, *supra*). The court defined action with "intent to defraud" as acting "knowingly and with the specific intent to deceive, for the purpose of either causing

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[3] *United States* v. *Guy*, 456 F. 2d 1157 (C.A. 8); *United States* v. *Robinson*, 545 F. 2d 301 (C.A. 2); *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9); *McCarty* v. *United States*, 409 F. 2d 793 (C.A. 10). (See Pet. 5-7.)

some financial loss to another or bringing about some financial gain to one's self" (*ibid.*). Shortly after the challenged language, the court repeated that "[f]raudulent intent is one of the essential elements of the offense of which the defendant is charged, and such intent must be clearly proved or inferred from the evidence beyond a reasonable doubt to warrant a conviction" (*ibid.*). Elsewhere in the charge, the court cautioned that the instructions must be considered as a whole (I R. 218); that the presumption of innocence is in itself sufficient for acquittal unless the evidence satisfies the jury of a defendant's guilt beyond a reasonable doubt; and that the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged (I R. 219). Thus, the court in its charge as a whole, and in the context of the specific language complained of, avoided shifting the burden of proof away from the prosecution.

Moreover, petitioner was not prejudiced in his defense that he was duped into making false statements about the success of the "Don Mason" dealership without knowing that they were false. Several witnesses testified that petitioner actually represented himself as Mason when called and that he played the part with "enthusiasm" (Pet. App. 15a). The jury must have found that petitioner knew his statements were false, thereby rejecting his defense, and it would follow that he intended to deceive the callers. On the facts presented, then, the jury's verdict must have been based on an actual finding of the requisite intent, and the challenged language in the instruction could not have prejudiced petitioner.

2. Petitioner's claim (Pet. 8-10) that he was denied his right to a speedy trial was fully answered by the court of appeals (Pet. App. 16a-27a). Applying the balancing test of *Barker* v. *Wingo*, 407 U.S. 514, the court found that

while the 19-month delay was sufficiently long to require inquiry into other factors (Pet. App. 20a), it was in fact justifiable (*id.* at 22a-23a). Petitioner and his co-defendants had never vigorously asserted their right to be tried (*id.* at 20a-22a), and petitioner failed to establish that he was prejudiced since the witnesses who purportedly became unavailable during the period of delay were not critical to his defense (*id.* at 26a-27a).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

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[4]The court of appeals' decision is not inconsistent with *Dickey* v. *Florida*, 398 U.S. 30, which addressed a situation in which a state offered "no tenable reason" for a seven-year delay during which two witnesses had died, another had become unavailable, and public records of possible relevance to the guilt of the defendant had been lost or destroyed (398 U.S. at 36).

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